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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**LARRY C. FLYNT,
LFP VIDEO GROUP, LLC,
and LFP IP, LLC,**

Plaintiffs,

vs.

**FLYNT MEDIA CORPORATION,
a Delaware Corporation; JIMMY
FLYNT, II; DUSTIN FLYNT; and
DOES 1 through 10 inclusive,**

Defendants.

Case No.: 2:09-cv-00048-AHM-
RZx

**PLAINTIFFS' TRIAL BRIEF
[PURSUANT TO LOCAL RULE
16-10]**

1 Plaintiffs Larry C. Flynt, LFP Video Group, LLC and LFP IP, LLC
2 (“Plaintiffs”) respectfully submit the following Trial Brief filed pursuant to Local
3 Rule 16-10:
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6 **1. Local Rule 16-10(a): Update of newly decided cases**
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8 Plaintiffs are currently unaware of any statutory changes or newly decided
9 cases within the Ninth Circuit, by Ninth Circuit Court of Appeals or the Supreme
10 Court of the United States that modify the laws relevant to this case.
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12 **2. Local Rule 16-10(b): Brief of issues as Directed by the Court.**
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14 At this time, the Court has not requested supplement briefs on any issues.
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16 **3. Local Rule 16-10(c): Reply to Defendants’ Memorandum of**
17 **Contentions of Fact and Law.**
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19 **A. The Lanham Act claims**
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21 Contrary to Defendants’ Contentions of Fact and Law, there is clear
22 evidence that consumers will likely be confused as to the source of Defendants’
23 line of “FLYNT” DVDs.
24

25 Consumers of adult films cannot distinguish between Defendants’ “FLYNT”
26 line of adult films and the adult films sold by Plaintiffs. When survey participants,
27 who were consumers of adult entertainment materials, were presented with
28

1 Defendants' "FLYNT" DVD, up to 64% were confused as to the source of the
2 product. Plaintiffs' expert witness, Dr. Bruce Isaacson has opined this is a "very
3 high" percentage of confusion. When asked to explain how they determined the
4 source of the "FLYNT" DVD, the survey participants repeatedly indicated that
5 they believed Larry Flynt was the source of the DVD because of the FLYNT name
6 and mark emblazoned across the top of the DVD box cover. Thus, regardless of the
7 alleged sophistication of adult video consumers or the time they take to chose an
8 adult DVD, when presented with Defendants' "FLYNT" DVD, consumers are
9 confused as to the source of the Defendants' DVDs and believe that Larry Flynt
10 produced it or was somehow involved with the production of the subject DVDs.
11 This dovetails exactly with the overarching purpose of trademark law, specifically
12 to "'avoid confusion in the marketplace' by allowing a trademark owner to
13 'prevent [] others from duping consumers into buying a product they mistakenly
14 believe is sponsored by the trademark owner.'" Mattel, Inc. v. Walking Mountain,
15 353 F.3d 792, 806 (9th Cir. 2003) (citations omitted).

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22 Moreover, Defendants' argument that their products are distinguishable
23 because they are not using the HUSTLER trademark is of no avail. There is only
24 one famous Flynt, Larry Flynt, and his name is so prominent that when consumers
25 see the FLYNT name they immediately assume Larry Flynt or one of his
26 companies produced the product. Moreover, despite Defendants' contentions, the
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1 evidence will show that the Larry Flynt name and mark does not always appear
2 with or alongside the HUSTLER mark.
3

4 Larry Flynt is internationally famous and, among other things, has made
5 numerous television appearances, spoken at prestigious universities, and been
6 subject of a major motion picture film, titled “The People v. Larry Flynt”. The
7 evidence will show that Plaintiffs used and continue to use the Larry Flynt name
8 and trademark to sell adult motion pictures and DVDs. This is not the only use of
9 Larry Flynt’s name. Among other things, Larry Flynt’s name is on the masthead
10 of all of LFP’s adult magazine publications, including *Hustler*, *Barely Legal* and
11 *Taboo*. His name and image are found throughout various adult websites operated
12 by Larry Flynt’s companies. Plaintiffs and their related companies use the
13 LARRY FLYNT trademark in connection with Hustler Casino; the ten-story
14 FLYNT PUBLICATIONS office building located in Beverly Hills, California; its
15 various Flynt businesses such as Flynt Management Group; and, Larry Flynt’s
16 name and image is used to promote the HUSTLER apparel line of clothing, hats
17 and novelty items.
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24 By using the FLYNT name on adult motion pictures, Defendants are
25 attempting to trade-off their uncle’s famous name and trademark as well as his
26 fame and notoriety. Dustin and Jimmy Flynt are by no means famous. In fact,
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1 even Defendants' own expert witness did not know the name of the Defendants
2 until he was retained in this matter.
3

4
5 **B. Right of Publicity/Privacy Claims.**
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7 By preparing the "FLYNT" line of adult DVDs, Defendants planned to use
8 Larry Flynt's name and fame to market their product. In addition, they crafted a
9 marketing campaign that was intended to deceive the public into believing Larry
10 Flynt supported and endorsed Defendants' products. Defendants chose to promote
11 their "FLYNT" line of DVDs with the marketing slogan "YOU KNOW THE
12 NAME, YOU KNOW THE GAME", which is an unmistakable reference to Larry
13 Flynt. He is the only Flynt with a "name" or a "game" in the adult entertainment
14 industry.
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19 Likewise, Defendants' other marketing slogan, the "NEXT CHAPTER
20 BEGINS", suggests that Larry Flynt is involved with and/or that he approves of
21 their "FLYNT" line of DVD products. Larry Flynt is the only Flynt with a long
22 and storied history; therefore, only he, not Defendants, could have a "next
23 chapter."
24

25 Defendants' use of the "FLYNT" mark on adult DVDs, combined with their
26 marketing slogans and materials are intended to trade off Larry Flynt's name and
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1 identity. By doing this, Defendants are violating Larry Flynt's right of privacy and
2 right of publicity.
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4 5 6 **C. Defendants' Unclean Hands Affirmative Defense.**

7 To prevail on an unclean hands defense, "the defendant must demonstrate
8 that the plaintiff's conduct is inequitable and that the conduct relates to the subject
9 matter of its claims." Fuddruckers, Inc. v. Doc's B.R. Others, Inc., 826 F.2d 837,
10 847 (9th Cir.1987)). Within the context of a Lanham Act claim, a defendant
11 claiming unclean hands is generally required to prove the plaintiff has made
12 material false statement regarding the intellectual property he seeks to protect.
13 Such false and deceptive claims can render a trademark unenforceable. *Id.* For
14 example, when plaintiff employed a Scandinavian marketing theme for ice cream
15 that was not made in Scandinavia, the defendant had a valid unclean hands defense
16 because plaintiff made false claims about the product's origin; therefore, its
17 intellectual property was deemed unprotectable. Haagen-Dazs, Inc. v. Frusen
18 Gladje, Ltd., 493 F. Supp. 73, 76 (S.D.N.Y 1980). Similarly, the Supreme Court
19 held that a laxative named "Syrup of Figs" was an unprotectable trademark when it
20 did not contain any figs or fig juice. Worden & Co., v. California Fig Syrup Co.,
21 187 U.S. 516, 533-34, (1903).
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1 Here, there is no evidence, or claim, that Plaintiffs falsely or deceitfully used
2 the Flynt name or mark in any capacity. In fact, this lawsuit was precipitated by
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4 *Defendants* misleading use of the Flynt name.

5 Instead of arguing Plaintiffs improperly used their Larry Flynt trademark,
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7 Defendants claim the unclean hands doctrine applies because Larry Flynt
8 terminated the employment of their father, Jimmy Flynt, Sr. This argument fails for
9
10 at least three reasons. First, the termination of the employment relationship
11 involved non-parties to this lawsuit. Second, the termination of Defendants' father
12 is wholly unrelated to the factual and legal issues presented in this lawsuit. Third,
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14 the termination of the Defendants' father did not inequitably harm Defendants.

15 A cursory review of the pleadings herein show that Defendants' father,
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17 Jimmy Flynt, Sr., is not a party to this lawsuit and that any purported employment
18 claims are not remotely related to this Lanham Act and right of publicity litigation.
19
20 Even under the most liberal and broad reading of the pleadings, the purported
21 wrongful termination of Jimmy Flynt, Sr., a non-party to this litigation, cannot be
22 construed as being related to the subject matter of this case.
23

24 Additionally, the termination of Jimmy Flynt, Sr. did not affect the equitable
25 relationships between the parties. Defendants are grown adults that operate their
26
27 own business; therefore, they have no standing to claim they have been harmed by
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1 the termination of their father's employment. Plaintiffs did not affect the rights of
2 Defendants in any manner.
3

4 If Defendants insist on pursuing their unclean hands affirmative defense, the
5 evidence will show that there were valid reasons for the termination. However, the
6 veracity, or lack thereof, of any claim made by Jimmy Flynt, Sr., a non-party,
7 needs to be adjudicated on its merits in a separate proceeding where the parties can
8 engage in full discovery on those issues. This trial should not become an *ad-hoc*
9 forum to resolve employment claims, if any such claims exist. Therefore,
10 Plaintiffs respectfully submit that the Court should not entertain Defendants' claim
11 of unclean hands as an affirmative defense.
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16 DATED: December 1, 2009

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19 By: /s/ Jonathan W. Brown
20 Jonathan W. Brown
21 Attorneys for Plaintiffs
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